

A Practical Guide to Equal Employment Opportunity: Law, Principles and Practices

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BOOK REVIEWS

A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY: LAW, PRINCIPLES AND PRACTICES by WALTER B. CONNOLLY, JR. New York: Law Journal Press. Two Volumes. Footnotes, table of cases, index, appendices. 1975. Pp. xxiv + 1378. \$60.00 cloth.

Katheryn M. Dutenhaver*

Mrs. Boriss applies for general production work at your corporation which manufactures window and central air conditioners. She has been told by her husband, one of the company's employees, that jobs are available and to see you, the personnel representative. In the initial interview, you are reluctant to give a definitive response to Mrs. Boriss because there is a company policy that prohibits hiring spouses of present employees. It was enacted less than five years ago because there had been a higher rate of absenteeism among married couples, as compared with other employees, apparently due to the fact that if one were sick the other often stayed home. Although the no-spouse policy seems to be neutral, you are aware that seemingly neutral policies of other companies have been found to be discriminatory. You have the responsibility of deciding whether adhering to company policy, by refusing to hire Mrs. Boriss, violates any existing law.¹

To aid you in determining whether this or other fact situations present potentially discriminatory employment practices, Mr. Walter B. Connolly, Jr. has written a two-volume set entitled, *A Practical Guide to Equal Employment Opportunity: Law, Principles and Practices*.² Mr. Connolly, who is labor counsel for the Firestone Tire and Rubber Company, has litigated many different types of civil rights cases and counseled in a variety of employer-employee matters.

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1. 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6492 (1976). In a similar fact situation, the Equal Employment Opportunity Commission [hereinafter referred to as EEOC] (on March 2, 1976) found

reasonable cause to believe an employer [had] unlawfully discriminated against the female spouse of one of its employees by refusing to hire her on the basis of its policy against hiring the spouses of employees. There was no showing of a business necessity for the policy and that, coupled with a showing of a statistical pattern of hiring which disproportionately rejected females as a class, further demonstrated employer's violation of the Act.

Id.

2. W. CONNOLLY, JR., A PRACTICAL GUIDE TO EQUAL EMPLOYMENT OPPORTUNITY: LAW, PRINCIPLES AND PRACTICES (1975) [hereinafter cited as CONNOLLY].

A new, highly specialized field of law has developed since the enactment of the Equal Pay Act of 1963³ and especially since Title VII of the Civil Rights Act of 1964 was amended in 1972,⁴ giving litigation powers to the Equal Employment Opportunity Commission ("EEOC" or "the Commission") and expanding its jurisdiction.⁵ As a result of the rapid development of both case law and statutory enactments, the law in this area is in a state of flux.⁶ Consequently, employers have been searching for guidelines to help them foresee acts which might be found to be discriminatory by enforcement agencies.

In response to this demand, Mr. Connolly has attempted to aid the in-house counselor, personnel representative, union official, plant manager, employment agency representative, or non-specialist, by providing a single source that can be used for practical advice regarding employment discrimination law. His work includes, but is not limited to, affirmative action programs, reporting information requirements of enforcement agencies, and procedures in responding to discrimination charges and in defending or initiating lawsuits.

The author begins by summarizing existing statutes and executive orders as a background to various employment problems.⁷ He then takes each component of personnel administration from pre-employment inquiries to seniority systems and lay off policies and discusses it in light

3. 29 U.S.C. §206(d)(i) (1963). The section provides:

No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs . . . which require equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Id.

4. 42 U.S.C. §2000e *et seq.* (Supp. II, 1972), *amending* 42 U.S.C. §2000e *et seq.* (1970).

5. 42 U.S.C. §2000e-5(a) (Supp. II, 1972), *amending* 42 U.S.C. §2000e-5(a) (1970).

6. For additional information, see S. AGID, *THE FAIR EMPLOYMENT LITIGATION MANUAL* (1975), which is a procedural guide to Title VII litigation. The manual was prepared under a grant from the Equal Employment Opportunity Commission as part of an Employment Rights Project at Columbia Law School, New York.

7. In addition to the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 as amended, the author provides summaries of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* (1970); Exec. Order No. 11,246, 3 C.F.R. 339 (Supp. 1965), *as amended*, Exec. Order No. 11,375, 3 C.F.R. 14,303 (Supp. 1967); The National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1970); Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*; the century old Civil Rights Act of 1870, 42 U.S.C. §1981 (1970); and the Civil Rights Act of 1871, 42 U.S.C. §1983 (1970).

of case law available at the time of writing.⁸ He examines employment discrimination law as it applies to situations involving the physically handicapped, racial minorities, females, the aged, and religious practitioners,⁹ but concentrates most of his discussion on Title VII examples (race, sex, national origin, and religion) and EEOC procedures.¹⁰ Controversial topics, such as quotas and the use of statistical evidence in proving discrimination, are discussed.¹¹ Throughout, the author reviews the applicable United States Supreme Court decisions, federal district and court of appeals cases, National Labor Relations Board decisions, and EEOC determinations in an attempt to present as many fact situations as possible so that the reader may better predict the law's requirements as they relate to his set of facts.

The book is most effective as a planning tool. The second volume is composed entirely of forms and sample documents, which are especially useful to the employer who must oversee employment programs.¹² There are sample affirmative action programs, various checklists, and examples of interrogatories and requests for admissions.¹³ Copies of government guidelines and lists of miscellaneous publications also are included.¹⁴

Probably the strongest feature of this work is the fact that the author is able to explain substantive problem areas quite adequately—even while attempting the impossible task of including every possible employment discrimination problem that has arisen or ever will arise. He

8. The reader should be aware that few cases are cited that were decided more recently than 1973.

9. For additional materials regarding special categories, see A. BLUMROSEN, *BLACK EMPLOYMENT AND THE LAW* (1971); T. OEHMKE, *SEX DISCRIMINATION IN EMPLOYMENT* (1974).

10. Further information may be found in A. ADAMS, *TOWARD FAIR EMPLOYMENT AND THE E.E.O.C., A STUDY OF COMPLIANCE PROCEDURES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964* (1972).

11. Additional information may be found in E. IDELSON, *AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT—A GUIDEBOOK FOR EMPLOYERS*, 2 vols. (1974), available from the Superintendent of Documents, U.S. Gov't Printing Office, Washington, D.C. 20402.

12. 2 A. LARSEN, *EMPLOYMENT DISCRIMINATION* (1975) is a supplementary source to Mr. Connolly's second volume.

13. In addition, see CCH *EEOC COMPLIANCE MANUAL* (1976).

14. Other EEOC publications, which are available at the EEOC Publication Unit, 2401 E. St., N.W., Washington, D.C. 20506, include: *A DIRECTORY OF RESOURCES FOR AFFIRMATIVE RECRUITMENT* (1975); *EQUAL EMPLOYMENT OPPORTUNITY REPORT* (1973); *JOB DISCRIMINATION, LAWS AND RULES YOU SHOULD KNOW* (1974); *JOB PATTERNS FOR MINORITIES AND WOMEN IN PRIVATE INDUSTRY* (1975) (a ten volume set covering the U.S. and nine geographic regions); *QUESTIONS AND ANSWERS CONCERNING THE EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX* (1975); *RESOURCE MATERIALS FOR EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMANCE ACTION* (1975); and *WHAT EMPLOYERS, UNIONS AND EMPLOYMENT AGENCIES SHOULD KNOW ABOUT EQUAL EMPLOYMENT OPPORTUNITY* (1976).

does this in a manner which makes the book comprehensible to the layman as well as the lawyer. Mr. Connolly presumes no prior knowledge on the part of the reader. For instance, his discussion of grooming codes, which require different hair lengths for male and female job applicants and employees, thoroughly treats a selected issue in a manner which is understood easily by the reader.¹⁵ Writing in an overview fashion, he points out the issues involved. In light of the rapidly changing case law, he wisely does not lead the reader to think that the issues have been permanently resolved. In fact, grooming codes is a substantive area which has changed dramatically since the writing of this book. Recent decisions¹⁶ have held that the maintenance of grooming standards for males, but not for females, does not violate Title VII.¹⁷

However, the reader must be aware that the author's overview approach can become an over-simplification and in some instances is misleading. For example, he advises companies to prepare a counter conciliation proposal when presented with a conciliation agreement drawn up by the EEOC,¹⁸ but his discussion of conciliation agreements consists merely of a statement that most contain a back-pay provision and extensive reporting requirements.¹⁹ This would lead the reader to think that conciliation agreements are very limited in scope.²⁰ At a minimum, the reader needs to know that each agreement can be tailored to the particular set of facts,²¹ that there are commission standards for conciliating various types of charges,²² and that generally the charging party finally determines whether to accept the proposal.²³ The company faced with a conciliation proposal would find the Commerce Clearing House's EEOC Compliance Manual²⁴ to be an excellent source for clarification

15. 1 CONNOLLY, *supra* note 2, at 106 *et seq.*

16. See *Wamsganz v. Missouri Pac. R.R.*, 391 F. Supp. 306 (E.D. Mo. 1975), *aff'd*, 527 F.2d 1249 (8th Cir. 1975) in which the district court followed the Ninth, Fifth, and D.C. Circuits.

17. The EEOC has indicated its present posture on this issue by sending charging parties form letters stating that due to recent federal court decisions in this area, which have found that male hair length and facial hair restrictions do not violate Title VII, conciliations on these issues will be impossible. Accordingly, cases will be administratively closed and right-to-sue notices will be issued so that charging parties may pursue the matter in federal court if they so desire.

18. 1 CONNOLLY, *supra* note 2, at 339.

19. *Id.*

20. An invitation to conciliate follows an EEOC determination that there is reasonable cause to believe that Title VII has been violated. CCH EEOC COMPLIANCE MANUAL ¶ 1261 (1976).

21. *Id.* at ¶ 1224 (1976).

22. *Id.* at ¶ 7301 *et seq.*

23. *Id.* at ¶ 1265.

24. *Id.* at ¶ 1221 *et seq.*

of the complexities which Connolly's treatment ignores.

The statement that word-of-mouth referrals are illegal is another example of incomplete treatment of a complex issue.²⁵ The author limits his discussion to referrals from a predominantly white/male work force, possibly leading the reader to assume this would be the only fact pattern in which word-of-mouth referrals could be found to be discriminatory. The reader should be aware that in late 1973, the EEOC found the practice discriminatory in a work force that was predominantly black in that it operated to deny equal notice of existing job opportunities.²⁶

The reader is advised to use the book as a practical guide but with Mr. Connolly's own caveat that this area of law is constantly changing²⁷ and therefore, one cannot rely solely on a book such as this when confronted with a specific fact situation.²⁸ Already, his words have been proven true. In June 1976, the United States Supreme Court held that a test used to screen applicants for public employment and not shown to be designed to discriminate, provides no basis for an inference of purposeful discrimination simply because it has a disproportionate impact on racial minorities.²⁹ This decision, though distinguishable as a case involving the equal protection component of the Fifth Amendment Due Process Clause rather than a Title VII case, may nevertheless rekindle argument on the principle established by *Griggs v. Duke Power Co.*³⁰ that proof of discrimination does not require proof of intent to discriminate.³¹ Though the impact of this most recent Supreme Court decision cannot be assessed accurately at this time, at the very least the decision demonstrates that the law in this area remains unsettled. Additionally, the spouses rule referred to above³² and the author's discussion of senior-

25. 1 CONNOLLY, *supra* note 2, at 49.

26. Commission Decision No. 74-31, 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 6404 (1976).

27. See text accompanying notes 1 & 16 *supra* for examples of areas in the law which have changed since the writing of Connolly's book.

28. CONNOLLY, *supra* note 2, at xxiii. The most complete reference to suggest to a reader who seeks to supplement his knowledge of employment discrimination law or who desires to research a particular substantive problem in the area is a three-volume set, Employment Practices Guide, printed in looseleaf form and updated regularly by Commerce Clearing House, 1-3 CCH EMPLOYMENT PRACTICES GUIDE (1976). These three volumes should be used together with the Equal Employment Opportunity Commission Compliance Manual, also prepared by Commerce Clearing House, CCH EEOC COMPLIANCE MANUAL (1976).

30. 401 U.S. 424 (1971).

31. For cases following *Griggs* see Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969); United States v. H. K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); Dobbins v. Local 212, IBEW, 292 F. Supp. 413 (S.D. Ohio 1968).

32. See text accompanying note 1 *supra*.

ity rules³³ further indicate that the reader should use the book as an introduction to a specific problem area and then update the materials discussed.

In addition to being aware of the necessity for updating the law when focusing on a particular problem area, the reader must be cognizant of the fact that there are some inaccuracies in the book. The statements that the notice of charges form does not include the name of the charging party³⁴ and that there is a current EEOC policy of expanding administrative investigations³⁵ are incorrect.³⁶ Furthermore, there is an interchangeable use of the terms "no probable cause"³⁷ and "no reasonable cause" with reference to EEOC determinations. The proper standard is "no reasonable cause." In the interest of precision, the reader should be advised that contrary to the author's statement,³⁸ the district director, not just the EEOC, can amend a determination. Although this is usually not done, the district director may consider amending in exceptional cases when the respondent comes forward with significant evidence, which there had been no prior opportunity to present.³⁹

33. The status of seniority rules which may have an adverse impact on women and minorities remains uncertain following recent decisions by the United States Supreme Court. See *Franks v. Bowman Transp. Co.*, 96 S.Ct. 1251 (1976); *Jersey Cent. Power & Light Co. v. Local 327, IBEW*, 508 F.2d 687 (3d Cir. 1975), *rev'd sub. nom.*, *EEOC v. Jersey Cent. Power & Light Co.*, 96 S.Ct. 2215 (1976); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 96 S. Ct. 2214 (1976).

34. 1 CONNOLLY, *supra* note 2, at 333.

35. *Id.* at 420.

36. EEOC Notice Form 131, which has a February 1973 print date, does name the Charging Party. Also of interest is the fact that a very recent change has occurred regarding notice. On August 11, 1976 the procedural regulations of the Equal Employment Opportunity Commission were changed to provide that within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with the notice of the charge within ten days after the filing of the charge. 2 CCH EMPLOYMENT PRACTICES GUIDE ¶ 5401 (1976). Agency procedures do call for a limitation on the scope of the investigation as the following indicates:

[A]lthough the Commission can investigate broadly and examine and copy documents related to dates of hire, job placements, promotions, seniority, wage rates and the like . . . , it cannot go beyond the boundaries of the charge—it may not engage in "fishing expeditions."

1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 1958 (1976). Furthermore, Mr. Connolly is incorrect when he states that there are no time limitations imposed for the filing of discrimination charges under the Equal Pay Act, for example. See 1 CONNOLLY, *supra* note 2, at 336. There are time limitations. See 2 CCH EMPLOYMENT PRACTICES GUIDE 11,092 (1976).

37. 1 CONNOLLY, *supra* note 2, at 337.

38. *Id.* at 338.

39. 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 3930.196(d) (1976).

More detrimental to the book's effectiveness than its inaccuracies is the author's expression of bias. He suggests that the most helpful guideline to use in formulating a pre-employment application form is to determine if there is a sound business necessity for eliciting the particular information.⁴⁰ But one wonders why this comment is followed by "Great caution should be used because the EEOC's enforcement activities are well-financed and are backed up with increased statutory authority."⁴¹ While the author's initial advice is sound, one would hope that his follow-up statement is not his primary reason for giving it.

Similarly, Mr. Connolly recommends "great caution" throughout the rules he suggests one follow when the EEOC investigator comes to visit.⁴² For example, he suggests that the respondent representative insist on being present when employee witnesses are being interviewed during an investigation.⁴³ Following Mr. Connolly's advice could backfire, because the "stonewalling" he suggests may lead the investigator to suspect that there is more to the charge than the respondent is ac-

40. 1 CONNOLLY, *supra* note 2, at 43.

41. *Id.*

42. Mr. Connolly's recommended procedure includes:

When the Investigator Comes to Visit

a. Be friendly and courteous at all times. Don't argue or complain about the unfairness of the charge. Personality as well as substance plays an important part in the investigation.

b. Unless you have a particularly strong position and have been advised to do so by legal counsel, don't present your case to the investigator. Let him or her ask questions and, where possible, answer them. If you don't know the answer, say so. Don't make up answers and don't guess.

c. Don't sign an affidavit even if the investigator requests you to do so. You don't have to and it can be damaging in a subsequent hearing.

d. Don't provide documentation unless the investigator asks for it or unless it is particularly helpful to your position. The agency can always subpoena whatever it wants to see at a subsequent time.

e. Have another management employee in the office with you during the investigator's interview of you and others. At least one of you should take notes as to what is said during these interviews, as federal and state courts permit the investigator to testify concerning admissions against interest made by the company's representatives in the course of a fair employment practice investigation.

f. Try to keep the investigator on track. For example, if he is there on a charge concerning an alleged racially motivated discharge, don't go into facts with respect to seniority.

g. If you run into a legal problem, seek appropriate professional help.

It should be noted that many class actions and broad EEOC lawsuits have arisen from innocuous charges. Thus, even though a charge may appear innocuous, if improperly handled, it may be expanded into a major lawsuit.

Id. at 347-48.

43. *Id.* at 346.

knowledging. The author's recommendation does not allow the investigator to operate as the neutral third party fact finder intended by Title VII,⁴⁴ but rather describes an adversary relationship between the respective representatives of the respondent and the Commission. The author's approach further assumes that the investigation will be broad and need not be limited to the precise allegations of the formal charge.⁴⁵ He asserts that the EEOC can "seldom resist inquiring into all aspects of an employer's practices"⁴⁶ despite the fact that the requirement of notice to respondents precludes anything as blatant as the author suggests. This attitude further encourages the reader to view the relationship between the respondent and investigator as adversary and may have very detrimental effects.

The author's discussion of what to do when faced with an EEOC investigation should have included a more constructive suggestion. If the respondent discovers evidence indicating that discrimination has occurred, he should discuss the possibility of a pre-determination settlement with the Commission's representative, rather than waiting until the Commission begins the investigation. An early settlement obviously limits a company's potential back pay liability and, where applicable, results in the charging party's waiver of the right to sue on the allegations of the charge,⁴⁷ thereby ending the prospect of litigation. Because pre-determination settlements also save the backlogged local district office the time required to do complete investigations, the district office generally will give priority to the respondent's offer of early settlement. In view of the above factors, the most practical advice in many cases may well be initiation by the respondent of pre-determination settlement procedures.

When the author follows his stated "practical" approach, his book, read and used with the above-mentioned caveats, can be a very useful tool. However, his lengthy discussion of what he views as EEOC non-compliance with the provision of the Administrative Procedure Act⁴⁸ is

44. The basic mission of the EEOC is the implementation and, since the 1972 amendments to the Civil Rights Act of 1964, the enforcement of the equal employment opportunity provisions of the Act. This purpose is effectuated through accepting and investigating charges of discrimination made by employees or other "affected" persons or their representatives against employers, unions, and employment agencies subject to Title VII. The Commission is directed by the Act to attempt to obtain voluntary compliance with the Act's requirements through conciliation, conference, or persuasion in an informal manner after the filing of any such charge. 1 CCH EMPLOYMENT PRACTICES GUIDE ¶ 1909.

45. 1 CONNOLLY, *supra* note 2, at 345.

46. *Id.* at 537.

47. CCH EEOC COMPLIANCE MANUAL ¶ 1265(b)(1976).

48. 1 CONNOLLY, *supra* note 2, at 385-402.

a noteworthy contrast to what one would expect to find in a practical guide. Similarly, he digresses on the issue of deduction of unemployment compensation from backpay.⁴⁹ The author following a practical approach would note that the Commission rule established in *NLRB v. Gullet Gin Co.*⁵⁰ is not to deduct unemployment compensation in computing backpay. He then would move on, rather than editorializing at length on his disagreement with the Commission on this point.

Despite these drawbacks and some editorial deficiencies,⁵¹ the book can be a useful and worthwhile investment. It characterizes the substantive issues in employment discrimination. To the lawyer or non-lawyer who suddenly is charged with the responsibility of preventing employment discrimination practices, it provides a ready resource. The reader gains an overview of the kinds of employment practices which have been found to be discriminatory as well as some notion of the areas which, although yet unlitigated, may still be determined to be discriminatory. The books also can be effectively used as an introduction to the complexity of a particular substantive problem, often providing numerous citations as a starting point for further research.

49. *Id.* at 523-26.

50. 340 U.S. 361 (1951).

51. The reader would have found more extensive indexing with thorough cross referencing most helpful in this type of material. Also, a consistent presentation of completed and parallel citations would have been more useful. The insertion of question marks in the place of some page numbers is an obvious defect.